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Southern District of New York
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COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUDGE BAER

-----X
UNITED STATES OF AMERICA,

Plaintiff,

v.

APOLLO THEATER FOUNDATION,

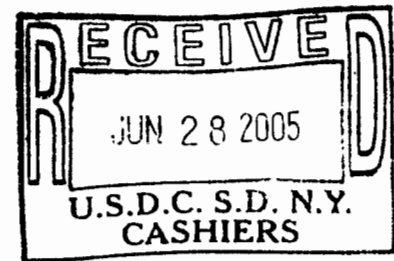
Defendant.
-----X

05 CV 5988

COMPLAINT

05 Civ. _____ ()

ECF CASE



The United States of America, by its attorney Alberto Gonzales, Attorney General of the United States, and David N. Kelley, United States Attorney for the Southern District of New York, alleges as follows:

1. This is a civil action brought to redress discrimination on the basis of disability in violation of Title III of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12181 et seq., and its implementing regulation, 28 C.F.R. Part 36 (the "Regulation").

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 42 U.S.C. § 12188(b)(1)(B) and 28 U.S.C. §§ 1331 and 1345.

3. Venue lies in this District pursuant to 28 U.S.C. § 1391(b), as all of defendant's acts of discrimination alleged in this complaint occurred in this District.

THE PARTIES

4. Plaintiff is the United States of America.

5. Upon information and belief, defendant Apollo Theater Foundation (the "Foundation" or "Defendant") is a New York corporation, with a principal place of business at 235 West 125th Street, New York, New York, which operates the Apollo Theater (the "Theater"), also located at 235 West 125th Street, New York, New York.

6. The Theater is a place of public accommodation within the meaning of the ADA, 42 U.S.C. § 12181(7), because it is a "theater, . . . or other place of exhibition or entertainment." The Theater includes, among other things, a lobby, ticket window, ticket office, dressing rooms, backstage areas, stages, orchestra pits, seating on orchestra, mezzanine and/or balcony levels, lounges, and toilet rooms.

7. The Theater has a seating capacity of approximately 1,464 persons.

ENFORCEMENT BY ATTORNEY GENERAL

8. Upon information and belief, there are persons with disabilities who have been injured by defendant's failure to remove barriers to access for persons with disabilities where removal is readily achievable.

9. There is reasonable cause to believe that Defendant has engaged in a pattern or practice of discrimination under the ADA and that this action raises an issue "of general public importance." 42 U.S.C. § 12188(b)(1)(B)(i), (ii).

CLAIMS FOR RELIEF

CLAIM I

READILY ACHIEVABLE BARRIER REMOVAL

10. There are numerous architectural barriers that have prevented or restricted access to the Theater by individuals with disabilities in that the Theater's services, features, elements and spaces have not been readily accessible to, or usable by, individuals with disabilities, as specified by the Regulations. 28 C.F.R. §§ 36.304, 36.308(a); Standards for Accessible Design, 28 C.F.R. Part 36, App. A (the "Standards").

11. Architectural barriers to access which have existed at the Theater include, but are not limited to, the following:

a. The Theater has not had a reasonable number of wheelchair seating locations that are readily accessible to, and usable by, individuals with disabilities, including individuals who use wheelchairs, and has not provided companion seating next to the wheelchair seating locations. 42 U.S.C. § 12182(b)(2)(A)(iv); 28 C.F.R. §§ 36.304 and 36.308; 28 C.F.R. Part 36, App. A, §§ 4.1.3(19)(a) and 4.33.

b. The Theater has not had wheelchair seating locations that are readily accessible to, and usable by, individuals with disabilities, including individuals who use wheelchairs, that are

located so that they are dispersed throughout the seating areas. 42 U.S.C. § 12182(b)(2)(A)(iv); 28 C.F.R. §§ 36.304 and 36.308; 28 C.F.R. Part 36, App. A, §§ 4.1.3(19)(a) and 4.33.

c. The Theater has not had a reasonable number of seats that have no armrests or that are equipped with folding or removable armrests that are suitable for transfer from a wheelchair (“aisle transfer seating”). 42 U.S.C. § 12182(b)(2)(A)(iv); 28 C.F.R. §§ 36.304 and 36.308; 28 C.F.R. Part 36, App. A, § 4.1.3(19)(a).

d. The doors in certain areas of the Theater have not been readily accessible to, and usable by, individuals with disabilities, including individuals who use wheelchairs, as a result of, among other things, non-compliant hardware, threshold height, door width, and opening force. 42 U.S.C. § 12182(b)(2)(A)(iv); 28 C.F.R. § 36.304; 28 C.F.R. Part 36, App. A, §§ 4.1.2, 4.1.3(7), and 4.13.

e. The Theater’s restrooms have not been readily accessible to, and usable by, individuals with disabilities, including individuals who use wheelchairs. 42 U.S.C. § 12182(b)(2)(A)(iv);

28 C.F.R. § 36.304; 28 C.F.R. Part 36, App. A, §§ 4.1.3(11) and 4.22.

f. The Theater's drinking fountains and public telephones have not been readily accessible to, and usable by, individuals with disabilities, including individuals who use wheelchairs. 42 U.S.C. § 12182(b)(2)(A)(iv); 28 C.F.R. § 36.304; 28 C.F.R. Part 36, App. A, §§ 4.1.3 (10), 4.1.3(17), 4.15, and 4.31.

12. Upon information and belief, it is readily achievable for Defendant to remove the architectural barriers to access identified in paragraph 11. By failing to remove barriers to access to the extent it is readily achievable to do so, Defendant has violated Title III of the ADA, 42 U.S.C. § 12182(b)(2)(A)(iv) and 28 C.F.R. § 36.304.

CLAIM II

READILY ACHIEVABLE ALTERNATIVES TO BARRIER REMOVAL

13. In the alternative, if it is not readily achievable to remove all of the barriers to access set forth in paragraph 11, Defendant must provide readily achievable alternatives to barrier removal as required by 42 U.S.C. § 12182(b)(2)(A)(v) and 28 C.F.R. § 36.305.

14. Upon information and belief, there are readily achievable alternatives to barrier removal that Defendant could have undertaken and must undertake in order to make the goods,

services and facilities offered at the Theater accessible to individuals with disabilities. 42

U.S.C. § 12182(b)(2)(A)(v); 28 C.F.R. §§ 36.305 and 36.308.

15. Upon information and belief, it is readily achievable for Defendant to undertake alternatives to barrier removal. By failing to undertake alternatives to barrier removal to the extent it is readily achievable to do so, Defendant has violated Title III of the ADA, 42 U.S.C. § 12182(b)(2)(A)(v) and 28 C.F.R. § 36.305.

CLAIM III

REASONABLE MODIFICATIONS TO POLICIES, PRACTICES, AND PROCEDURES

16. Upon information and belief, Defendant has failed to make reasonable modifications to their policies, practices and procedures to make the goods, services, and facilities of the Theater available to individuals with disabilities, as specified by Title III of the ADA and the Regulations. 42 U.S.C. §§ 12182(b)(1)(A)(ii), 12182(b)(2)(A)(ii); 28 C.F.R. § 36.302(a).

17. Upon information and belief, Defendant has afforded, and continues to afford, individuals with disabilities who wish to purchase tickets to wheelchair seating locations an opportunity to purchase tickets that is unequal to that afforded to others, by utilizing administrative methods that have the effect of discriminating on the basis of a disability. 42 U.S.C. §§ 12182(b)(1)(A)(ii), 12182(b)(1)(D)(i); 28 C.F.R. §§ 36.202(b), 36.204.

18. Upon information and belief, Defendant's non-compliant policies, practices and procedures include, but are not limited to, failing to modify their sales policies and practices to ensure that wheelchair and companion seating afford an equal opportunity to participate in or

benefit from the Theater's goods and services. 28 C.F.R. §§ 36.308(a)(ii)(A) & (B), Part 36, App. A, § 4.33.3.

PRAYER FOR RELIEF

WHEREFORE, the United States of America prays that the Court enter judgment that:

A. Declares that Defendant has violated Title III of the ADA, 42 U.S.C. §12182, at the Theater (1) by failing to provide wheelchair, companion and aisle transfer seating pursuant to 28 C.F.R. § 36.308; (2) by failing to remove architectural barriers to access pursuant to 28 C.F.R. § 36.304; (3) by failing to provide alternatives to barrier removal pursuant to 28 C.F.R. § 36.305; (4) by failing to modify policies, practices and procedures when necessary to afford goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities pursuant to 28 C.F.R. § 36.302; (5) by failing to utilize administrative methods that afford people with disabilities who wish to purchase tickets to accessible seating locations an opportunity to purchase tickets that is equal to that afforded to others pursuant to 42 U.S.C. § 12182; 28 C.F.R. §§ 36.202, 36.204; and (6) by failing to provide people with disabilities seats that have lines of sight comparable to those offered to members of the general public pursuant to 28 C.F.R. § 36.308;

B. Orders Defendant to provide a reasonable number of accessible wheelchair locations, aisle transfer seating locations and companion seating locations that are dispersed throughout the seating area pursuant to 42 U.S.C. §§ 12182(b)(2)(A)(iv), 12188(b)(2)(A); 28 C.F.R. § 36.308;

C. Orders Defendant to remove all architectural barriers pursuant to 42 U.S.C. §§ 12182(b)(2)(A)(iv), 12188(b)(2)(A); 28 C.F.R. § 36.304 and 28 C.F.R. Part 36, App. A,

including, but not limited to, removing the architectural barriers to access set forth in paragraph 11;

D. Orders Defendant to provide readily achievable alternatives to barrier removal in all instances, if any, where it is not readily achievable to remove architectural barriers pursuant to 42 U.S.C. §§ 12182(b)(2)(a)(v), 12188(b)(2)(A); 28 C.F.R. § 36.305;

E. Orders Defendant to make reasonable modifications to their policies, practices and procedures, including ticketing policies, practices and procedures, when necessary to afford people with disabilities equal access to the goods, services, facilities, privileges, advantages or accommodations provided at the Theater pursuant to 42 U.S.C. §§ 12182(b)(2)(A)(ii), 12188(b)(2)(A); 28 C.F.R. §§ 36.302, 36.308;

F. Awards monetary damages to persons who have been injured by Defendant pursuant to 42 U.S.C. § 12188(b)(2)(B) and 28 C.F.R. § 36.504(a)(2);

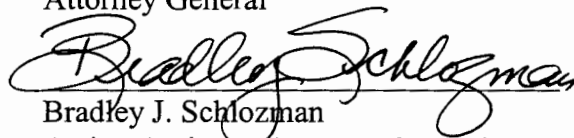
G. Assesses a civil penalty against the Defendant in an amount authorized by 42 U.S.C. § 12188(b)(2)(C) and 28 C.F.R. § 36.504(a)(3), to vindicate the public interest; and

H. Orders such other appropriate relief as the interest of justice may require.

Dated: New York, New York
June 27, 2005

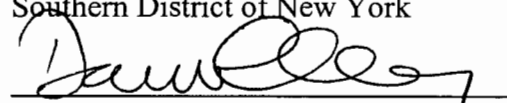
ALBERTO GONZALES
Attorney General

By:


Bradley J. Schlozman
Acting Assistant Attorney General
Civil Rights Division

DAVID N. KELLEY
United States Attorney for the
Southern District of New York

By:

A handwritten signature in black ink, appearing to read "David Kennedy", written over a horizontal line.

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